Supreme Court, U.S.
FILED
DEC 29 1998
OFFICE OF THE CLERK

No. 98-836

# In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

*v.*

DANIEL MAGANA-PIZANO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

1288

## TABLE OF AUTHORITIES

Cases:


*Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) ..... 8
*Carlson* v. *Landon*, 342 U.S. 542 (1952) ..... 8
*CFTC* v. *Schor*, 478 U.S. 833 (1986) ..... 9
*Chow* v. *INS*, 113 F.3d 659 (7th Cir. 1997) ..... 6
*Crowell* v. *Benson*, 285 U.S. 22 (1932) ..... 9
*FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) ..... 8
*Felker* v. *Turpin*, 518 U.S. 651 (1996) ..... 8
*Goncalves* v. *Reno*, 144 F.3d 110 (1st Cir. 1998), petition for cert. pending, No. 98-835 ..... 6, 7, 9, 10
*Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996 ..... 3, 6
*Hose* v. *INS*, 141 F.3d 932 (9th Cir.), withdrawn, No. 97-15789 (Dec. 2, 1998) ..... 5
*Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996) ..... 7
*LaGuerre* v. *Reno*, No. 98-1954 (7th Cir. Dec. 22, 1998) ..... 2, 3, 9
*Richardson* v. *Reno*, No. 98-4230, 1998 WL 889376 (11th Cir. Dec. 22, 1998) ..... 3, 4, 8
*United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) ..... 8
*United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957) ..... 8


Constitution and statutes:


U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension of Habeas Corpus Clause) ..... 2, 4, 6, 8, 9
Art. III ..... 8
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
§ 440(a), 110 Stat. 1276 ..... 1, 2, 5, 7

Statutes—Continued: Page

§ 440(d), 110 Stat. 1277 ..... 1, 9, 10
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 309(c)(4)(G), 110 Stat. 3009-626 ..... 1, 5
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1182(c) (1994) ..... 2, 10
8 U.S.C. 1252(a)(2)(C) (Supp. II 1996) ..... 5
8 U.S.C. 1252(g) (Supp. II 1996) ..... 1, 4, 5, 6, 7
28 U.S.C. 2241 ..... 1, 2, 6, 7, 8, 9, 10

# In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-836

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

*v.*

DANIEL MAGANA-PIZANO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

1. The Ninth Circuit has held unconstitutional 8 U.S.C. 1252(g) (Supp. II 1996), as applied to criminal aliens who are subject to the preclusion-of-review provisions of Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276, and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626. As we explain in the certiorari petition (at 14-16), a decision holding an Act of Congress unconstitutional warrants review by this Court. Respondent essentially ignores that compelling basis for review by this Court.

2. Respondent argues (Br. in Opp. 14-17) that there is no conflict among the circuits on the jurisdictional issue decided by the court of appeals—namely, that a district court may exercise jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241, to review a criminal alien's claims (a) that the Attorney General erroneously determined that Section 440(d) of AEDPA, 110 Stat. 1277, applies in pending deportation

cases to bar discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) to certain classes of criminal aliens, and (b) that, so construed by the Attorney General, Section 1182(c) violates constitutional equal-protection principles as applied to his case, because it denies eligibility for discretionary relief from deportation to criminal aliens placed in deportation proceedings in the United States, but not those seeking admission when returning from abroad. Recently, however, two courts of appeals have disagreed with the Ninth Circuit's ruling in this case and have held that Congress permissibly precluded access to the district courts in immigration cases under Section 2241.

In *LaGuerre* v. *Reno*, No. 98-1954 (Dec. 22, 1998), which (as respondent notes, Br. in Opp. 15 n.15), raises the same jurisdiction and merits issues as those presented here, the Seventh Circuit rejected the Ninth Circuit's decision in this case. The Seventh Circuit held that the district courts may not exercise jurisdiction under Section 2241 over claims such as those raised by respondent in this case. The Seventh Circuit concluded that, in Section 440(a) of AEDPA, 110 Stat. 1276, Congress had precluded the covered classes of criminal aliens' access to the district courts by habeas corpus under 28 U.S.C. 2241. *LaGuerre*, slip op. 7 ("We conclude that for the class of aliens encompassed by section 440(d), judicial review by means of habeas corpus did not survive the enactment of that section."). The court further held that this preclusion of district court jurisdiction does not violate the Suspension of Habeas Corpus Clause, U.S. Const., Art. I, § 9, Cl. 2. It first expressed "doubt that the suspension clause requires preserving habeas corpus as a vehicle for challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is

not in question." *LaGuerre*, slip op. 4. It then suggested that judicial review for aliens covered by Section 440(d) of AEDPA has not been "totally extinguished," *id.* at 7, because aliens may be able, on petition for review of a deportation order filed directly in the court of appeals, to "challenge their deportation on constitutional grounds," *id.* at 9. The court expressed assurance that, under the regime established by Congress requiring that all challenges to deportation orders be heard, if at all, in the courts of appeals, "the layering of judicial review proposed by [the aliens] is avoided, judicial review is curtailed as Congress intended, but enough of a safety valve is left to enable judicial correction of bizarre miscarriages of justice." *Id.* at 8.[1]

Similarly, in *Richardson* v. *Reno*, No. 98-4230, 1998 WL 889376 (Dec. 22, 1998), the Eleventh Circuit concluded that Congress "strip[ped] all jurisdiction,

---

[1] The Seventh Circuit noted that the purpose of Congress's 1996 amendments to the immigration laws precluding review of criminal aliens' challenges to their deportation orders "was to curtail and speed up judicial review of deportation orders directed against disfavored classes of criminals, such as drug offenders." *LaGuerre*, slip op. 6. But "[i]f the effect of the new provision was * * * to shift judicial review to the district court, followed of course by appeal to this court, then Congress *enlarged* judicial review for these deportees (and for no others![])." *Ibid.* (emphasis added); see *id.* at 7 (noting that, if the courts that have held to the contrary are right, then "Congress accomplished nothing toward its aim of curtailing judicial review," and "[m]aybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed by* review by the courts of appeals"). See also *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) (finding itself bound by precedent to agree with decision below, but acknowledging that "review in the courts of appeals seems more consistent with congressional intent"), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996 (filed Dec. 17, 1998).

including § 2241 habeas, from the district courts." *Id.* at *4. The Eleventh Circuit emphasized (*id.* at *13) that 8 U.S.C. 1252(g) (Supp. II 1996) provides that, notwithstanding "any other provision of law, no court shall have jurisdiction" to review the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders under the Immigration and Nationality Act (INA). As the Eleventh Circuit explained, Section 1252(g)'s "broad admonition that it applies 'notwithstanding any other provision of law' sufficiently and clearly encompasses other provisions of law, such as § 2241. When Congress says 'any,' it means 'any' law, which necessarily includes § 2241." *Richardson*, 1998 WL 889376, at *13. Moreover, the Eleventh Circuit concluded, this preclusion of review in the district courts presents no constitutional difficulty under the Suspension of Habeas Corpus Clause. *Id.* at * 28-*29. It noted that the courts of appeals still retain, on petition for review of a removal order, authority to "determine that the removal order: (1) is against an alien (2) who is removable (3) by reason of having committed a criminal offense covered in certain enumerated sections," and also the authority to "entertain a constitutional attack" upon the INA itself. See *id.* at *29 (internal quotation marks omitted).[2]

---

[2] Respondent argues (Br. in Opp. 17-18) that *Richardson* does not conflict with the decision below because it did not involve judicial review of a final order of deportation. The ruling in *Richardson*, however, was *broader* in scope than the context of review of final deportation orders, and necessarily encompassed the conclusion that the district courts lack jurisdiction under 28 U.S.C. 2241 to entertain challenges to final orders of deportation. See *Richardson*, 1998 WL 889376, at *13 ("Accordingly, we conclude that [Section 1252(g)] repeals any statutory jurisdiction over immigration decisions other than that conferred by [Section 1252]. That repeal includes § 2241 habeas jurisdiction over immigration decisions by

3. Respondent suggests (Br. in Opp. 18-19) that this case is of limited importance because it concerns only the transitional jurisdictional rules of AEDPA and IIRIRA. That is incorrect. Although the decision below construed a transitional provision of IIRIRA, Section 309(c)(4)(G), to preclude review of all of respondents' claims raised in his petition for review (see Pet. App. 30a-31a), the court followed decisions construing the similar Section 440(a) of AEDPA (see Pet. 16-17 n.9), and there is little reason to doubt that the court will do likewise in construing the substantively similar permanent replacement, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996).[3] Moreover, that construction will not be affected by the court of appeals' recent grant of rehearing en banc in *Hose* v. *INS*, 141 F.3d 932 (9th Cir. 1998), withdrawn, No. 97-15789 (Dec. 2, 1998), because *Hose* does not involve a criminal alien covered by either Section 440(a) of AEDPA or Section 309(c)(4)(G) of IIRIRA.

---

the Attorney General under the INA."). Indeed, as discussed in the text, the court specifically considered and rejected Richardson's contention that, if Section 1252(g) precluded district court habeas jurisdiction over immigration decisions under 28 U.S.C. 2241, then it would violate the Constitution because he would have no opportunity for judicial review of his final order of deportation. See 1998 WL 889376, at *28-*29.

[3] The court of appeals did note (Pet. App. 30a n.3) that the permanent jurisdictional changes made by IIRIRA in Section 1252(a)(2)(C) were not before it, and on that basis the INS has argued (in order to preserve its jurisdictional position) that courts are not obligated to extend the decision below to cases arising under IIRIRA's permanent jurisdictional provisions, especially in other circuits (see Br. in Opp. 19 n.17). The rationale for the decision below, however, suggests the Ninth Circuit will follow and extend it when construing Section 1252(a)(2)(C).

Accordingly, whatever the outcome of the rehearing en banc in *Hose*, it is likely that, in the future, courts in the Ninth Circuit will conclude one of two things. They may conclude—as the panel below concluded in this case—that all direct review in the court of appeals is precluded for criminal aliens like respondent, that review in the district courts under 28 U.S.C. 2241 is precluded for the same aliens by Section 1252(g) (which is applicable to IIRIRA's permanent review provisions), and that the resulting total preclusion of review violates the Suspension of Habeas Corpus Clause, requiring recourse to Section 2241 as a remedy. Alternatively, they may conclude—as the First Circuit concluded in *Goncalves* v. *Reno*, 144 F.3d 110 (1998), petition for cert. pending, No. 98-835, and the Second Circuit concluded in *Henderson* v. *INS*, 157 F.3d 106 (1998), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996—that Section 1252(g) does not preclude the district court from reviewing deportation orders under 28 U.S.C. 2241. Either decision would leave the district courts free to review orders of deportation, and either would be wrong, as we have explained in our petitions in this case, in *Goncalves*, and in *Navas*.[4]

---

[4] Respondent contends (Br. in Opp. 9) that the position advanced in our petition, that a criminal alien covered by the jurisdiction-limiting and preclusion-of-review provisions of AEDPA and IIRIRA may nonetheless raise constitutional challenges to provisions of the INA affecting his deportation order on a petition for review in the court of appeals, is inconsistent with the government's position in *Chow* v. *INS*, 113 F.3d 659 (7th Cir. 1997), where the government moved for dismissal of the petition for review, and in *Goncalves*. *Chow*, however, involved only non-constitutional challenges to the alien's deportation order. See *id.* at 662. After AEDPA was enacted, Chow argued that its withdrawal of the court of appeals' jurisdiction over his petition for review was itself

4. Respondent defends the court of appeals' conclusion by arguing that Section 2241 was not repealed by implication in AEDPA (Br. in Opp. 20-22). The court of appeals, however, did not agree with respondent's position that AEDPA had no effect on Section 2241. To the contrary, it concluded (Pet. App. 20a) that Section 1252(g) had indeed "forfended access to relief under 28 U.S.C. § 2241 in immigration cases" (although it found that result to be unconstitutional). The First and Second Circuits have concluded that Section 1252(g) did not preclude access to the district courts under 28 U.S.C. 2241, as respondent notes (Br. in Opp. 20-21). But as the Eleventh Circuit observed, that reading is not faithful to the plain language of Section 1252(g). That Section "states comprehensively that '[e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction' over the specified claims. * * * Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by" the

---

unconstitutional, see *id.* at 668, but that is not a "constitutional claim[]" raised against the deportation order itself (see Br. in Opp. 8). In *Goncalves*, the alien did not file a petition for review in the court of appeals; he filed only a habeas corpus petition in district court. The First Circuit had previously held in *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996) that Section 440(a) of AEDPA precluded it from exercising jurisdiction over petitions for review filed by criminal aliens covered by that Section, but that case also involved only non-constitutional challenges to a deportation order. Similarly, the fact that we opposed certiorari in cases in which the courts of appeals dismissed petitions for direct review, where the aliens had not filed habeas corpus petitions and the courts of appeals had therefore not comprehensively addressed the issue of habeas corpus jurisdiction (see Br. in Opp. 9 & n.11) in no way suggests that review is unwarranted in this case, where respondent did file a habeas corpus petition under Section 2241, and the court of appeals did comprehensively address the jurisdictional issue.

INA itself. *Richardson*, 1998 WL 889376, at *14. The rule against repeals by implication articulated in *Felker* v. *Turpin*, 518 U.S. 651 (1996), therefore has no application here; Section 1252(g) ousts the district courts' jurisdiction under 28 U.S.C. 2241 explicitly, not impliedly.

Respondent also notes (Br. in Opp. 23- 24) that this Court has considered, in habeas corpus proceedings, aliens' claims that they were eligible to be considered for discretionary relief from deportation. In neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), did the Court's opinion address the question of habeas corpus jurisdiction, however, and certainly in neither case did the Court suggest that habeas corpus jurisdiction was required by the Constitution itself. This Court has never considered itself bound by *sub silentio* jurisdictional holdings in the manner respondent suggests. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

Although respondent maintains (Br. in Opp. 24-25) that judicial review of his *non-constitutional* claim is required by Article III as well as the Suspension of Habeas Corpus Clause, this Court has recognized that the federal courts have jurisdiction under Article III to review statutory questions only to the extent that Congress assigns it to them, see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984), and also that "[t]he power to expel aliens, being essentially a power of the political branches of government, * * * may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) (internal quotation marks omitted); see *ibid.* ("No judicial review [of

deportation orders] is guaranteed by the Constitution."). That is especially so where, as here, the alien does not challenge his deportability (or, therefore, the INS's jurisdiction over him), but rather challenges the Attorney General's denial of discretionary relief from deportation. See *LaGuerre*, slip op. 9 (doubting that the Suspension of Habeas Corpus Clause "requires preserving habeas corpus as a vehicle for challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is not in question").[5]

5. Finally, respondent urges (Br. in Opp. 25) this Court to grant his conditional cross-petition for a writ of certiorari, to ensure that the Court may reach all the jurisdictional issues in the case and grant complete relief. We agree, for the reasons set forth in our response to that conditional cross-petition (see 98-1011 Gov't Br. for Cross-Resp.). Respondent also suggests (Br. in Opp. 26) that it would not be appropriate to grant certiorari in *Goncalves* to address the merits of the Attorney General's construction of Section 440(d) of AEDPA, because the Court would not be able to reach that issue in *Goncalves* if it agrees with the government that the district courts lack jurisdiction under Section 2241. Should the Court disagree with our jurisdictional argument, however, and conclude that jurisdiction was

---

[5] Respondent relies (Br. in Opp. 24) on *CFTC* v. *Schor*, 478 U.S. 833 (1986), for the proposition that the federal courts must have authority to review his non-constitutional claim, but that case involved a federal agency's authority to adjudicate a state-law claim, not limitations on a federal court's jurisdiction to review a federal agency's determination of a federal statutory issue. See *id.* at 850-858. Moreover, the Court has noted that immigration cases involve "public rights" that may be assigned to administrative agencies for adjudication. See *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932).

proper in the district court under Section 2241, then it would be able in *Goncalves* to reach the merits of the temporal scope of Section 440(d) (which is independently worthy of this Court's review). But if the Court agrees with our jurisdictional position, then it would be able to resolve the temporal scope of Section 440(d) by granting review in *Reno* v. *Navas*, petition for cert. pending, No. 98-996, which presents all the jurisdictional issues presented in this case and *Goncalves*, and also raises the merits issues as well. In *Navas*, one of the aliens (Navas), like respondent here, filed both a petition for review and a petition for habeas corpus, and another (Henderson) filed a petition for review; the Second Circuit dismissed the petitions for review but granted relief to Navas on his habeas corpus petition, after concluding on the merits that Section 440(d) of AEDPA does not apply to aliens who filed an application for discretionary relief under Section 1182(c) before AEDPA was enacted. See 98-996 Pet. 14-19. If either Navas or Henderson files a conditional cross-petition for a writ of certiorari challenging the Second Circuit's dismisal of his petition for review (as respondent did here, to preserve his opportunity for relief), then the Court will be able reach the merits of the Section 440(d) issue in *Navas*, even if it concludes that the district courts lack jurisdiction under 28 U.S.C. 2241.

* * * * *

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

DECEMBER 1998